FEDERAL ELECTION COMMISSION
Washington, DC 20463

Robert K. Kelner, Esq.
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850 Tenth Street, NW
Washington, DC 20001

JUL - 8 2016

RE: MUR 6823
Trustmark National Bank

Dear Mr. Kelner:

On May 22, 2014, the Federal Election Commission ("Commission") notified your client, Trustmark National Bank ("Respondent"), of a complaint alleging that Respondent violated the Federal Election Campaign Act of 1971, as amended ("Act"). After reviewing the allegations in the complaint, your client's response, and publicly available information, the Commission, on June 27, 2016, found no reason to believe that Respondent violated 52 U.S.C. § 30118. Accordingly, the Commission closed its file in this matter as it pertains to Respondent. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

The Commission reminds Respondent that the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A) remain in effect, and that this matter is still open with respect to other respondents. The Commission will notify Respondent when the entire file has been closed.

If you have any questions, please contact Saurav Ghosh, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT:	)	MUR: 6823
Trustmark National Bank	)	

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Tea Party Patriots Fund and its Chair, Jenny Beth Martin. *See* 52 U.S.C. § 30109(a)(1) (formerly 2 U.S.C. § 437g(a)(1)). The Complaint, as amended, alleges that Trustmark National Bank ("Trustmark") made a prohibited national bank contribution when Trustmark loaned $250,150 to Mississippi Conservatives ("MC") without Trustmark having a secured interest in a certificate of deposit ("CD") worth approximately $250,543 that a Trustmark depositor pledged as collateral for the loan. The Amended Complaint also alleges that Trustmark certified a portion of an MC disclosure report that inaccurately described the collateral for the loan.

We recommend that the Commission find no reason to believe that Trustmark made a prohibited contribution to MC because the totality of the circumstances indicates that Trustmark was assured of repayment when it made the loan. Additionally, we conclude that the inaccurate certification does not constitute an independent violation of the Act or Commission regulations by Trustmark.

II. BACKGROUND

MC, which registered with the Commission on January 15, 2014, is an independent-expenditure-only committee supporting multiple candidates, including Sen. Thad Cochran (Miss.), who was a candidate in the June 3, 2014, Republican Senatorial primary. Brian Perry is the treasurer of MC and its sole director. Corporate Resolution to Borrow / Grant Collateral, Ex.

E to Trustmark Resp.; MC Board Minutes of Special Actions, Ex. E to Trustmark Resp. Through October 15, 2014, MC had raised $3,357,903.00 and disbursed $3,020,285.90. MC Pre-General Report at 2 (Oct. 23, 2014). MC engaged in less activity after the primary election; since July 1, 2014, MC disclosed receipts of $390,250, disbursements of $84,901.35, and cash on hand of $337,617.10. *Id.*; Oct. Quarterly Rpt. at 2 (Oct. 15, 2014).

Trustmark National Bank ("Trustmark") is a nationally-chartered bank headquartered in Jackson, Mississippi, and is MC's depository. Trustmark Resp. at 2; MC Statement of Organization at 4 (Jan. 14, 2014). Harry M. Walker is Trustmark's Regional President of Central Mississippi. Walker Aff. ¶¶ 1-2 (attached to Trustmark Resp.).

A. Trustmark Loans $250,150 to MC and Takes a Security Interest in an Undisclosed Person's CD as Collateral

On September 3, 2013, Trustmark created a $250,000 CD with a nine-month term for an unidentified customer. Book Entry - Certificate of Deposit Receipt, Trustmark Resp. Ex. A; Jeremy Bond Aff. ¶ 3 (attached to Trustmark Resp.). Sometime before January 29, 2014, MC asked this unidentified customer to provide collateral for a loan from Trustmark to MC. Assignment of Deposit Account ("Assignment") at 1, Trustmark Resp. Ex. D. Further, Walker received a request for Trustmark to loan $250,000 to MC to be secured by the undisclosed depositor's CD, which by that time was worth $250,543.74. Walker Aff. ¶ 7. Walker directed Jeremy Bond, a Vice President and Branch Manager at Trustmark's Jackson, Mississippi, main office, to prepare the loan paperwork and process the loan. *Id.* ¶ 7, 8. Walker dictated the terms of the loan to Bond, including the interest rate, amount, and maturity date. Bond Aff. ¶ 4.

In addition to the loan documents to be signed by MC, the loan paperwork included an Assignment of Deposit Account ("Assignment"), by which the unknown person would pledge the CD as collateral for Trustmark's loan to MC. *See* Boarding Data Sheet, Trustmark Resp. Ex.

C; Assignment of Deposit Account, Trustmark Ex. D. The Assignment provides that it grants Trustmark "a security interest" in the CD "to secure" MC's debt to Trustmark, and describes Trustmark as a secured creditor under Mississippi law.[1] Assignment at 2-3; Trustmark Resp. at 3-5, 8.

On January 29, 2014, MC's Brian Perry met with Bond to execute the loan documents, Bond Aff. ¶ 10, and Trustmark disbursed $250,000 to MC. Boarding Data Sheet, Trustmark Resp. Ex. C.[2] MC used the loan funds for a $219,540 independent expenditure it made two days later for communications opposing candidate Chris McDaniel, Sen. Cochran's opponent in the primary. Compl. at 4; MC Independent Expenditure Rpt. (January 31, 2014) (disclosing that an expenditure was made or obligation incurred on January 31, 2014, for communications opposing McDaniel); MC Amended Apr. Quarterly Rpt. at 17 (May 17, 2014) (describing MC's receipt of $250,150 in loan funds from Trustmark as "IE Loan"); *id.* at 2, 6, 11, 13 (May 17, 2014) (disclosing no cash on hand at the start of the reporting period and the receipt of a total of four itemized contributions before January 31, 2014, totaling $160,000).

Trustmark, however, did not receive the signed Assignment from the CD's owner until February 5, Bond Aff. ¶ 11—one week *after* it had disbursed the loan proceeds to MC.[3]

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[1] Under the Assignment, Trustmark had the power to take all funds in the CD and apply them to the loan if MC defaulted. The Assignment also established that: Trustmark possessed the CD; in the event of MC's default on its loan, Trustmark could transfer title to all or part of the CD; the CD's owner, designated the "grantor", "irrevocably appoint[ed] [Trustmark] as Grantor's attorney-in-fact to execute endorsements, assignments and instruments in the name of Grantor (and each of them if more than one) as shall be necessary or reasonable"; and Trustmark enjoyed the rights and remedies of a "secured creditor." Ex. B to Bond Aff. The CD's owner was also prohibited from transferring or encumbering the CD. *Id.*

[2] The Promissory Note, dated January 29 and signed by Perry, specifies that the loan principal was $250,150, it had a maturity date of June 3, 2014, and the annualized interest rate was 2.650%. The Boarding Data Sheet indicates that the loan had a 2.864 % interest rate. Bond explained that the two rates were calculated using different formulas. Bond Aff. ¶ 7. The extra $150 of the loan principal in the promissory note was for a processing fee.

[3] The Assignment bears a pre-printed date of January 29, the date Bond generated the loan documents and the date that Perry met with Bond to sign them. It bears Perry's signature below the CD owner's signature, which Trustmark obscured.

According to Bond, "it is not unusual for a bank to close on a loan without the complete set of signed loan documentation when, as here, there is an existing banking relationship with the individual whose signature is requested, where the individual has committed to sign the paperwork, and where there is no reason to believe that the paperwork will not be signed." *Id.* ¶ 12.

B. MC Inaccurately Discloses the Trustmark Loan

On April 15, 2014, MC filed its first quarterly report disclosing the Trustmark loan, which contained a number of errors and omissions. MC Apr. Quarterly Rpt. at 26. Committees must disclose details about their loans on FEC Schedule C-1 and answer certain questions about these loans. The Schedule C-1 regarding the Trustmark loan inaccurately reported that a CD had *not* been pledged as collateral for the loan, and it erroneously listed the value of the collateral for the loan as "$0.00." *Id.* MC also reported that no other parties were secondarily liable for the loan. *Id.* The form Schedule also asked if the Committee had pledged its future receipts as collateral, and MC correctly responded "No." The Schedule also asked, "If neither of the types of collateral described above was pledged for this loan, or if the amount pledged does not equal or exceed the loan amount, state the basis upon which this loan was made and the basis on which it assures repayment." MC did not answer this question, nor did it attach the loan agreement, as the Schedule directs.

The Schedule C-1 includes both Perry's electronic signature as MC's treasurer as well as what purports to be Walker's electronically-signed certification, on behalf of Trustmark, that the disclosures on the Schedule were accurate, Trustmark was aware that loans had to be made on a

basis that assures repayment, and the loan complied with the requirements set forth at 11 C.F.R. §§ 100.82 and 100.142.[4]

MC filed an April 30, 2014, Miscellaneous Report that attached some of the loan documents: the Promissory Note, the Board Resolution, and the Errors and Omissions Agreement. MC did not, however, attach the Assignment, the document indicating that it did not own the pledged CD. Although the Promissory Note states that the collateral for the loan was "certificates of deposit described in an Assignment of Deposit Account dated January 29, 2014," the documents MC disclosed do not indicate that a third party owned the CD, and MC's Schedule C-1 erroneously states that there was *no* collateral and no secondarily liable party. Trustmark certified these inaccurate representations as true.

On May 12, 2014, MC filed an amended April Quarterly Report, which repeated the misstatements that a CD had not been pledged as collateral, the value of the collateral was $0.00, Trustmark did not have a secured interest in the collateral, and there were no secondarily liable parties. MC continued to leave blank the space provided to explain how the loan's repayment was assured if the loan was not secured by collateral or future receipts. MC Amended Apr. Quarterly Rpt. at 26 (May 12, 2014). It also continued to represent that Trustmark had certified the accuracy of the information on the form and the loan's compliance with the Commission's regulations. *Id.*

On May 15, 2014, the Complainant filed the original Complaint, which relied on the Schedule C-1 in MC's April Quarterly Report stating that there was no collateral for the loan. The Complaint alleged that Trustmark made a prohibited national bank contribution to MC

[4] This Schedule C-1, bearing what purports to be Walker's electronic signature and filed by MC with its original April Quarterly Report, is dated January 29, 2014 – the date that Trustmark disbursed the loan funds to MC. *Id.* About two weeks later, MC submitted, as part of a Miscellaneous Report, the original Schedule C-1 hand-signed by Walker, which was also dated January 29. *See* MC Miscellaneous Rpt. at 1 (Apr. 30, 2014). But in his sworn affidavit, Walker avers that he was not given the C-1 to sign until April 15. Walker Aff. ¶ 16.

because its loan to MC violated the Commission's regulations at 11 C.F.R. § 100.82, which require a lender to have an assurance of repayment. Compl. at 4-7.

Two days later, MC filed its Second Amended April Quarterly Report on which it checked "Yes" in response to the question asking if the loan was collateralized by any one of various types of security, including a certificate of deposit. MC Second Amended Apr. Quarterly Rpt. at 26 (May 17, 2014). In response to the form's direction, "If yes, specify," MC wrote "Certificate of Deposit." *Id.* But MC neither disclosed that it did not own the CD that secured the loan, nor did MC provide the loan document that showed that another party owned the CD, much less identify the owner of the CD. MC stated in response to another question on the form that Trustmark had a perfected security interest in the collateral, but it continued to state that no other party was secondarily liable for Trustmark's loan to MC.[5] MC Second Amended Apr. Quarterly Rpt. at 26 (May 17, 2014).

The Amended Complaint, filed on May 19, alleges that Trustmark violated the Commission's regulations because it lacked a perfected security interest in the CD serving as collateral for the loan. *Id.* at 5.

MC repaid the loan by May 30, 2014, a few days short of its June 3 maturity date. To date, MC and Trustmark have not identified the owner of the pledged CD.

As to Trustmark's allegedly prohibited contribution to MC by making the loan, Trustmark responds that the loan was not a contribution because Trustmark complied with the Act and the Commission's regulations, but even if it was a contribution to MC, the prohibition on national bank contribution is unconstitutional following *Citizens United*. Trustmark Resp. at

[5] This Amended Report also purported to bear Walker's electronic signature on the amended form's certification. But Walker avers that "it is my understanding that [MC] has filed multiple versions of the Schedule C-1 with the [Commission], all of which purport to include an electronic version of my signature. I was never consulted by [MC] prior to its making these additional C-1 filings." Walker Aff. ¶ 17.

5-9. According to Trustmark, the pledged CD assured it of repayment and thus the loan was not a contribution from Trustmark to MC. Trustmark Resp. at 5-11.

III. ANALYSIS

A. Trustmark's Loan Was Not a Contribution to MC Because it was Fully Secured

The Amended Complaint alleges that Trustmark made a prohibited contribution to MC by loaning it $250,150 without having a perfected security interest in the CD later pledged as collateral. Amend. Compl. at 5.

The Act prohibits national banks from making contributions and prohibits political committees from knowingly receiving them. 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)). Contributions include "loans" or "anything of value" made for the purpose of influencing an election, 52 U.S.C. § 30101(8)(A)(i) (formerly 2 U.S.C. § 431(8)(A)(i)), but do not include bank loans made in the ordinary course of business "on a basis which assures repayment," that are "evidenced by a written instrument and subject to a due date or amortization schedule," and which are made at a usual and customary interest rate for the lender for the category of loan involved. 52 U.S.C. § 30101(8)(B)(vii) (formerly 2 U.S.C. § 431(8)(B)(vii)); *see also* 11 C.F.R. § 100.82(a) (a bank loan is not a contribution if it has those characteristics). The record establishes that the loan was made through a written instrument with a due date. Further, there is no allegation or information in the record suggesting that the interest rate (2.86%) on the loan was not Trustmark's usual and customary rate applicable to a loan backed by collateral on deposit equal in value to the loan.

The Complaint alleges, however, that Trustmark's loan to MC was not made on a basis that assures repayment because there was no collateral for the loan, Compl. at 6, or, alternatively, Trustmark did not have a perfected security interest in the loan. Amended Compl. at 4-5. For a

loan to be considered "made on a basis that assures repayment," the Commission's regulations require that the lender (a) "has perfected a security interest in collateral *owned by the candidate or political committee receiving the loan*"; (b) that "the fair market value of the collateral is equal to or greater than the loan amount and any senior liens as determined on the date of the loan"; and (c) "the political committee provides *documentation* to show that the lending institution has a perfected security interest in the collateral." 11 C.F.R. § 100.82(e)(1)(i) (emphasis added).

The transaction between Trustmark and MC clearly did not meet the section 100.82(e)(1)(i)(a) criterion because MC did not own the collateral for the loan.[6] If, as in this matter, a loan does not meet the requirements in 100.82(e), "the Commission will consider the totality of the circumstances on a case-by-case basis in determining whether a loan was made on a basis that assures repayment." 11 C.F.R. § 100.82(e)(3).[7] In past matters, the Commission has concluded that a bank loan did not constitute a prohibited contribution under the totality of the circumstances when the bank made the loan while intending that it would be assured of repayment. *See* General Counsel's Rpt. No. 2 at 3-8, MUR 5496 (Huffman) (loan that was not secured by collateral for a period of 90 days nonetheless was assured of repayment under the totality of the circumstances because the bank intended that repayment be assured where, *inter*

[6] Further, it is questionable whether the loan satisfied 100.82(e)(1)(i)(c) because Trustmark did not receive the signed documentation pledging the CD as collateral for the loan until seven days after it disbursed the loan funds to MC. Trustmark instead relied on a *verbal* pledge from the CD's owner to provide collateral for the loan until the bank received the Assignment, which one of Trustmark's affiants asserted was not unusual. Bond Aff. ¶ 12. (Upon its later receipt of the Assignment, Trustmark obtained a perfected security interest under Mississippi law in the CD because it was both pledged as collateral and on deposit with Trustmark. *See* Miss. Code Ann. 75-9-314; Trustmark Resp. at 8.)

[7] *See also* Factual and Legal Analysis at 2-7, MUR 5766 (Amalgamated Bank) (Commission took no further action after investigation revealed that bank loan that failed to meet regulation's requirements was nevertheless made on a basis assuring repayment under the totality of the circumstances); General Counsel's Rpt. No. 2 at 4-10, MUR 5685 (BancorpSouth Bank) (same); General Counsel's Rpt. No. 4 at 10-16, MUR 5652 (First Bank) (same); First General Counsel's Report at 20-25, MUR 5381 (Bishop) (bank assured of repayment for candidate's line of credit under the totality of the circumstances).

alia, the candidate verbally pledged to use retirement savings to repay the loan); First General Counsel's Rpt. at 5-10, MUR 5262 (Second National Bank) (under the totality of the circumstances, bank intended to assure repayment of the loan and therefore did not make a prohibited contribution where it required a cosigner, and the cosigner had a suitable credit history and relationship with the bank).

The available information indicates that Trustmark was assured of repayment when it made the loan to MC. Trustmark prepared the Assignment at the same time that it prepared the remainder of the loan documents, obtained a verbal pledge that a CD on deposit with Trustmark worth approximately the same as the loan principal would serve as the loan's collateral, and received the executed Assignment from the CD's owner one week after the loan was made. The Commission therefore finds no reason to believe that Trustmark violated Section 30118(a) (formerly 441b(a)).[8]

B. Trustmark and Walker's Inaccurate Schedule C-1 Certifications are not Independent Violations of the Act

Complainant also alleges that Trustmark violated the Act's disclosure requirements because it certified MC's inaccurate statements about the loan on the original Schedule C-1. Amended Compl. at 7, 9. There is no dispute that the bank's certification was inaccurate, but

[8] Because we recommend that the Commission find no reason to believe that Trustmark made a contribution, it is not necessary to reach Trustmark's argument that the national bank contribution prohibition is unconstitutional in light of *Citizens United*. Trustmark Resp. at 9. We note, however, that *Citizens United* did not address the prohibition against contributions by national banks in Section 30118. The Commission has consistently indicated that this prohibition remains undisturbed by *Citizens United*. *See Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 79 Fed. Reg. 62,797, 62,801(Oct. 21, 2014) (maintaining existing prohibitions against contributions and expenditures by national banks); *Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 76 Fed. Reg. 8083, 8085 n.6 (proposed Dec. 27, 2011) (Commission's proposed rulemaking to implement *Citizens United* states that "Corporations that are foreign nationals, government contractors, or national banks, and corporations that are organized by authority of any law of Congress continue to be prohibited from making independent expenditures or electioneering communications. 2 U.S.C. 441b, 441c and 441e.").

neither the Act nor the regulations attaches liability to the bank certifying the false statements. Instead, the party filing the relevant report is responsible for its accuracy.

The Commission's regulations at 11 C.F.R. § 104.3(d)(1)(v) require committees borrowing funds to submit a certification from the lending institution that (1) the borrower's statements on the Schedule C-1 are accurate, to the best of the lender's knowledge; (2) the loan or line of credit was made or established on terms and conditions no more favorable at the time than those imposed for similar credit granted to borrowers of comparable credit worthiness, and (3) the institution is aware of the requirement for terms which assure repayment and the bank has complied with 11 C.F.R. § 100.82 and 100.142.[9] *See* 11 C.F.R. § 104.3(d)(1)(v); AO 1994-26 at 4 (Scott Douglass Cunningham Campaign Committee). As the Commission explained when it promulgated these regulations, in addition to helping banks avoid making prohibited contributions, these lender certifications serve an important and public role by ensuring the reliability of committee loan disclosures based on information exclusively in the possession of the banks. *See Loans from Lending Institutions to Candidates and Political Committees*, 56 Fed. Reg. 67,118, 67,122. (Dec. 27, 1991) ("Explanation and Justification").

Trustmark acknowledges that some of Walker's certifications were inaccurate, and explains that Walker focused on the statements on the schedule regarding the loan amount and interest rate, but not the other statements. They state that Walker believed MC was "versed in FEC regulations," so he assumed the other statements on the form were accurate. Trustmark Resp. at 4, 14. It also argues that the errors in the Schedule C-1 were *de minimis*. Trustmark

[9] Schedule C-1 accordingly states that by signing the form, the lending institution is certifying that "To the best of this institution's knowledge, the terms of the loan and other information regarding the extension of the loan are accurate as stated" on the form, the loan was made on terms "no more favorable at the time than those imposed for similar extensions of credit to other borrowers of comparable credit worthiness," and that "This institution is aware of the requirement that a loan must be made on a basis which assures repayment, and [the lender] has complied with the requirements set forth at 11 CFR 100.82 and 100.142 in making this loan."

Resp. at 1, 14. The bank's excuses are weak, and the suggestion that the Commission should overlook the bank's negligence conflicts with the Commission's statements in the Explanation and Justification.

Nevertheless, a false or inaccurate certification, standing alone, is not a violation by the *lender* of a duty imposed by the Act or Commission regulations. The Commission's regulations, rather, impose a duty *on committees* to file accurate Schedule C-1s with properly reviewed lender's certifications. Accordingly, the Commission finds that there is no reason to believe that Trustmark violated the Act or Commission regulations when Walker certified the inaccurate Schedule C-1.

IV. CONCLUSION

Therefore, there is no reason to believe that Trustmark made a prohibited national bank contribution to MC in violation of 52 U.S.C. § 30118 (formerly 2 U.S.C. § 441b), or that Trustmark violated the Act or the Commission's regulations when Walker certified MC's inaccurate disclosures regarding Trustmark's loan to MC.